SERVED: March 17, 1994

NTSB Order No. EA-4112

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 7th day of March, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. NOEL B. BLANC, Respondent.	Docket SE-12124

OPINION AND ORDER

Both respondent and the Administrator have appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on March 20, 1992, following an evidentiary hearing.[1] The law judge affirmed in part an order of the Administrator that had charged respondent with violating 14 C.F.R. 91.111(a), 91.113(b), and 91.13(a), and proposed to

[1]The initial decision, an excerpt from the hearing transcript, is attached.

suspend respondent's commercial pilot certificate for 180 days.[2] The law judge affirmed the §§ 91.113(b) and 91.13(a) charges and dismissed the 91.111(a) charge. He reduced the suspension to 120 days.

On appeal, respondent argues that all the charges should have been dismissed. The Administrator seeks reinstatement of the § 91.111(a) charge and the greater sanction. We deny the respondent's appeal and grant that of the Administrator. The 180-day suspension is reinstated.

Respondent was the pilot in command of a Bell Jet Ranger helicopter operating at Santa Paula, CA airport on February 13, 1991. While respondent was hovering over the active runway, facing west and preparing for takeoff, his helicopter was hit from the rear by a Pitts biplane that had lifted off from the eastern end of the runway. The two occupants of the Pitts died.

---

[2] § 91.111(a) provides:

> No person may operate an aircraft so close to another aircraft so as to create a collision hazard.

§ 91.113(b) provides:

> (b) General. When weather conditions permit, regardless of whether an operation is conducted under Instrument Flight Rules or Visual Flight Rules, vigilance shall be maintained by each person operating an aircraft so as to see and avoid other aircraft in compliance with this section. When a rule of this section gives another aircraft the right of way, he shall give way to that aircraft and may not pass over, under, or ahead of it, unless well clear.

§ 91.13(a) provides:

> No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

Respondent and his two passengers suffered some, not serious, injury. Both aircraft were destroyed.

Prior to the accident, respondent's aircraft was parked on a helipad set off from, and approximately midpoint down, the runway. One of his passengers, also a helicopter pilot (Mr. Carra), raised the aircraft to a 4-foot hover, and respondent took the controls and turned the aircraft from its west-facing position to a position facing the runway. Between this time and when the helicopter reached the runway, both pilots testified that respondent stopped the aircraft intermediate to reaching the runway, and at that point scanned for traffic and announced on the Unicom radio that the helicopter was intending to take off on the active runway, departing westbound to southbound.[3] Respondent moved the helicopter to a position on the runway, somewhat off center, and heading west. He was continuing his hover over the runway doing further preflight checks[4] when the

[3]Respondent and Mr. Carra testified that respondent moved the aircraft out approximately 20-25 feet from the helipad and hovered, performing the clearing and radio activities at that time. An eyewitness to the accident, Mr. Krybus, on the other hand, testified that the aircraft moved directly from hovering above the helipad to the runway. Respondent challenges Mr. Krybus' testimony (see infra), but another witness, Mr. Murray, also testified that the helicopter did not stop (Tr. at 146), and a written statement by Mr. Blanc indicated that he performed these functions while hovering over the helipad. Tr. at 547. The Administrator, nevertheless, appears to assume the accuracy of respondent's hearing testimony that an intermediate stop was made. See, e.g., closing argument at 579.

[4]This may have taken 10 or more seconds. Tr. at 425 (8-11 seconds, per respondent; approximately 10 seconds, per Mr. Carra). Cf. 15-16 seconds, per respondent's expert, Don Lykins. In any case, timing issues are the subject of extensive debate. See discussion, infra.

Pitts hit the helicopter on its right side. The facts of the crash suggest that the Pitts saw the helicopter immediately prior to impact and attempted a steep bank to the right to avoid it. See, e.g., Tr. at 119. It was established on the record (the Administrator not arguing to the contrary) that respondent's takeoff procedures and method (i.e., using the runway for a helicopter takeoff and hovering before reaching and upon entering the runway) were acceptable.

The law judge believed that the critical question was which aircraft was on the runway first. He concluded, recognizing inconsistencies and flaws in various testimony, that the "overwhelming weight of the eyewitness testimony is that the Pitts was on the runway first." Tr. at 646. The law judge discounted various computer video recreations of the accident and time/distance studies designed by respondent to show that the helicopter was on the runway first. The law judge's basis for dismissing the § 91.111(a) charge was his belief that, because neither pilot saw the Pitts, neither could be guilty of operating the aircraft so close to another as to create a collision hazard. We address respondent's appeal first.

Respondent has structured his appeal with reference to the question of which aircraft reached the runway first, and attacks the law judge's finding in that regard. That finding is supported in the record but, more importantly, we do not see the issue in this case as who had the right-of-way, but as whether respondent exercised appropriate due care. Respondent does not

argue that he would have been entitled to take off ahead of the Pitts, had the Pitts already begun its takeoff roll when the helicopter reached the runway.[5] The eyewitness accounts convincingly show that the Pitts was in the process of taking off and had, in fact, lifted off, when the helicopter entered the runway airspace.

The Administrator offered the testimony of four key eyewitnesses in this regard: Joel Krybus, Ursula Obst, Daniel Murray, and Clarence Langerud.[6] Mr. Langerud, who was in his car at the far western end of the runway, testified quite specifically that, as he was waiting to drive across the runway, he saw the Pitts begin its takeoff roll towards him. The helicopter had not yet reached the runway. Tr. at 169-171.[7]

Contrary to respondent's allegation, the law judge's opinion (as well as a finding that the Pitts had begun its takeoff roll before the helicopter reached the runway) is supported by eyewitness testimony in addition to Mr. Langerud's. Mr. Murray

---

[5]See respondent's appeal at 29. We therefore find much of respondent's extended discussion of right-of-way rules moot. Respondent's suggestion (Appeal at 31) that, if the Pitts is on its takeoff roll and the helicopter then places itself midpoint down the runway, the Pitts should be considered as having improperly overtaken the helicopter does not, however, merit serious discussion.

[6]Another witness, Mr. Francis Gamble, only saw the Pitts preparing for takeoff. He never saw the helicopter after its liftoff.

[7]We reject respondent's suggestion that Mr. Langerud's testimony was contradictory. And, although the law judge recognized the difficulty in judging whether an aircraft is moving towards you, he did not reject that testimony outright, nor is it the only testimony on this point.

also testified that, although the Pitts had not taken the runway when the helicopter first lifted off, the Pitts was 300-400 feet into its takeoff roll when the helicopter reached the runway. Tr. at 116-117.[8] Counsel agreed to a Trial Stipulation that Ms. Obst, on whose testimony respondent greatly relies, offered no specific testimony as to where the helicopter was when she saw the Pitts on the runway. Tr. Stipulation at 435. In a written statement, however, Ms. Obst stated that the helicopter was moving toward the runway after the plane was in the air. Tr. at 543. See also Tr. at 103-104.

We agree with respondent that Mr. Krybus' testimony had some inconsistencies. Yet, the law judge took these matters into account in his credibility analysis and determined that the testimony was generally reliable. Tr. at 647-648. Respondent's appeal does not convince us otherwise. Mr. Krybus also believed that the Pitts was airborne before the helicopter reached the runway. See, e.g., Tr. at 72.

In addition to these observations, the law judge considered

[8]We do not agree with respondent (Appeal at 20) that this witness' later testimony was inconsistent and demonstrates that Mr. Murray did not know the relative positions of the aircraft. Respondent misstates the witness' testimony when he argues that Mr. Murray admitted that he could not tell if the Pitts was on the runway first. At this point in his testimony, Mr. Murray was stating only that he could not tell if the Pitts was on the runway prior to the helicopter lifting off -- a considerably different matter than which aircraft was on the runway first or whether the Pitts had begun its takeoff roll before the helicopter entered the runway. Respondent's repeated allegation that the Pitts had not entered the runway when the helicopter lifted off the helipad is equally immaterial to the issues presented here.

the testimony of respondent and Mr. Carra that they did not see the Pitts on the runway at any time. We disagree with respondent's contention that the law judge could not believe that testimony and also find that the Pitts was on the runway first (and therefore there to be seen). Although the law judge noted that both pilots in the helicopter testified that they never saw the Pitts (Tr. at 652), the law judge was merely acknowledging their belief, not accepting respondent's proposition regarding the relative positions of the two aircraft. The initial decision indicates that the law judge thoroughly considered and weighed the contradictory testimony and evidence. It is not inconsistent to believe respondent's statement that he did not see the Pitts and also find that the Pitts was on the runway before the helicopter.[9]

Primarily through his witness Lykins, respondent offered various mathematical calculations designed to show that the helicopter gained the runway first, but these calculations are not convincing rebuttal to the eyewitness accounts of disinterested observers and it was no error for the law judge to reject them. There appeared no reliable unanimity of opinion from which a reliable timetable could be created. Moreover, as the law judge aptly noted:

[9]Respondent offers no basis to conclude that, even though a number of the Administrator's witnesses knew the pilot of the Pitts, their testimony was in any way biased or unreliable for this reason. The law judge considered this matter as well. Tr. at 648.

> Here, it appears to me that Mr. Lykins took a fixed solution, and took all of the inferences and the statements and the information that he had and extracted that information that would justify the solution that he reached.

Tr. at 645. Witness Lykins admitted that he chose the data that was used in his time and distance calculations, even rejecting estimates given him by respondent and the passenger/copilot. Tr. at 462-463. In our view, the video re-creations of the event offer no assistance, based as they are, again, only on Mr. Lykins' data choices. In view of these concerns, respondent has not shown why this type of evidence should be preferred over contrary eyewitness accounts. See also Reply Brief at 24-30 and Tr. at 321 for difficulties in relying on this type of evidence.[10]

Respondent next argues that, even if the Pitts were on the runway first, the law judge's findings do not support a conclusion that respondent violated § 91.113(b) and 91.13(a). As § 91.13(a) may be a residual, derivative violation that need not be independently proven,[11] we focus on § 91.113(b), which

[10]Respondent argues, as a procedural matter, that it was error for the law judge to permit the Administrator to interview Mr. Lykins (off the record) and review respondent's "expert files" when discovery deadlines had long passed. We disagree. The need for these activities was of respondent's making. Respondent delayed in producing a long-promised video of the scene. When it was produced, very shortly before the hearing, it was not a video of actual scenes as the Administrator had (reasonably, we think) assumed but a computer animation. The law judge held, as a matter of fairness, that the Administrator was entitled to explore the background of this unexpected evidence and we can see no abuse of the law judge's discretion in his doing so.

[11]See Administrator v. Pritchett, NTSB Order EA-3271 (1991) at fn. 17.

prescribes pilot vigilance so as to see and avoid other aircraft. It seems axiomatic to us that, with the Pitts in its takeoff roll, a reasonable and prudent pilot should have seen that aircraft (and that if he failed to do so he failed in his duty of vigilance). Respondent, was, after all, hovering with full view of the entire runway. The question is not, as respondent frames it, whether he violated a standard of care due to some faulty technique (Appeal at 6). The Administrator has not alleged that respondent's procedure was somehow flawed. Absent some explanation why respondent did not see the Pitts, he cannot be found to have performed up to a reasonable standard of care. See Administrator v. Ferguson, 1 NTSB 328 (1968) (respondent could have and should have avoided the near collision).

Respondent further argues that the law judge improperly based his decision on an opinion that respondent spent too long on the runway performing his flight check. We need not comment on the law judge's conclusion, as it was unnecessary to his decision and does not undermine or in any way taint his findings that respondent violated § 91.113(b) and 91.13(a).

We are also not persuaded by respondent's other procedural claims. Respondent contests various decisions by the law judge to exclude evidence related to visibility in the Pitts and sees that exclusion as prohibiting him from offering exculpatory evidence indicating another cause for the collision. The Pitts is a tail-dragger, and we may take official notice that it is designed in a manner that limits the forward view. Despite the

law judge's rulings prohibiting related testimony on this subject, he clearly took this fact into account. See Tr. at 651.

Respondent, furthermore, misconstrues the nature of this proceeding. It is not intended to determine the cause of the crash. Nor does this proceeding suggest that the pilot of the Pitts was blameless. The actions of the Pitts pilot are not before us here, however. The sole issues before us involve whether respondent violated the specific regulations cited by the Administrator. Proof of such violations does not require any showing regarding visibility from inside the Pitts. And, there is no support for respondent's claim that this visibility evidence would have helped demonstrate that the helicopter was on the runway before the Pitts arrived or before the Pitts started its takeoff roll. Respondent cites Ferguson, supra, and other related cases, for the proposition that the law judge erred in prohibiting it. In Ferguson, evidence of visibility limits from respondent's cockpit was critical to his defense. Here, the visibility evidence respondent sought to introduce involved visibility from the Pitts, not the helicopter and, therefore, would not, as respondent alleges, offer an explanation for conduct that would otherwise give rise to an inference of carelessness. Accordingly, any error by the law judge in excluding this material, and we see none, would be harmless.[12]

[12]We would also note that respondent failed to make an offer of proof regarding this evidence and, from the transcript, it is clear that, at the time of the law judge's ruling, respondent did not advise him as to the import or purpose of testimony and evidence regarding the view from the Pitts.

Respondent next challenges the law judge's admission of testimony by the Board employee who investigated this accident (Thomas Wilcox) and the law judge's refusal to allow cross examination of the Administrator's expert witnesses on the Board's accident report, upon which they allegedly relied in their testimony. Although respondent fails to identify the involved expert witnesses, of which there were a number, we have reviewed the transcript and can find no error in the law judge's handling of the matter.

Respondent's premise -- that Mr. Wilcox's testimony was required to be limited to rebuttal impeachment -- is incorrect. We permit broader testimony in limited circumstances, and it did not stray into prohibited areas related to opinion or probable cause findings. See 49 C.F.R. 821.20. Mr. Wilcox primarily introduced and authenticated photos of the aircraft and the accident scene, none of which were either critical to the law judge's findings or disputed.[13]

As far as the scope of respondent's cross examination of Mr. Wilcox, the photos -- the greatest portion of his testimony -- speak for themselves. Respondent fails to offer any reason why he was harmed by the law judge's refusal to direct the witness to

[13]In fact, when respondent's counsel objected to testimony regarding burn marks, suggesting it was investigatory testimony, the Administrator agreed to strike it. Tr. at 209-210. The law judge invited respondent to challenge irrelevant testimony, and questioned why he had not done so earlier. Id.

Although counsel objected to testimony offered by Mr. Wilcox concerning an earlier written statement by respondent, that statement had nothing to do with the Board report.

answer questions regarding the alignment of the helicopter on the runway after the crash, or the location of the runway edge (questions the witness could not answer without referring to a Board report, see Tr. at 217-218). In any case, Mr. Wilcox did not rely on or use the Board report in offering the photos and authenticating them.

Respondent also argues that he was prejudiced because he was denied the opportunity to cross examine other witnesses regarding the Board's report. We find absolutely no basis in the record for this allegation.

The Administrator called Messrs. Roehm, Parrott, Woodward, Gamble, and Chemello. Messrs. Roehm and Woodward took photos and videos at the airport from a Bell Ranger and a Pitts, attempting to recreate the scene, determine visibility, and perform time/distance checks. Tr. at 238. Mr. Gamble flew the Pitts during these trials. Mr. Roehm testified that he relied on the Board report for the information that respondent was sitting in the helicopter's right front seat. Respondent fails to show what conceivable prejudice this statement could produce, especially as Mr. Carra later testified to the same fact. Tr. at 241. Mr. Roehm also testified that he had seen nothing in that report to conflict with his photos or what he saw, and we note that the Board's report was not available when the photos were taken. Tr. at 378.[14] Respondent was permitted to ask the witness whether he

[14]The witness did testify to a slight disagreement with Mr. Wilcox regarding the extent of visibility the day of the accident. See Tr. at 245. We fail to see how Mr. Roehm's

relied on the report, and does not indicate what critical question he was prohibited from asking.

As to the other witnesses, neither Mr. Parrott, another FAA investigator who was at the scene of the accident with Mr. Wilcox and took photos, or Mr. Chemello, who testified to appropriate helicopter operations, were cross examined by respondent's counsel, nor was any issue raised during their testimony regarding the Board report. Mr. Woodward was asked only one unrelated question.

Respondent contests the law judge's approval of a motion by the Administrator to amend the complaint. At the hearing, and after receipt of considerable testimony, the Administrator moved to amend the complaint to conform to the evidence. The exact wording of the amendment was never provided for the record, but it appears the Administrator's intent was to amend ¶ 6 of the complaint to provide that the Pitts had initiated its takeoff roll prior to the helicopter arriving at the edge of the runway. See Tr. at 332.[15] Respondent offers no convincing showing of prejudice from the law judge's action. Indeed, he offers no specific indication or example of how he was harmed or how

(..continued)
assessment that there was somewhat more than 4 miles visibility at the airport the day of the accident, as compared to Mr. Wilcox's report of 4 miles, could affect respondent's defense.

[15]As issued, ¶ 6 read:

> Prior to said liftoff described in paragraph 3 above, Civil Aircraft N31512, a Pitts S2A aircraft, had taxied onto runway 22 for takeoff. Civil aircraft N31512 initiated the takeoff roll prior to, or at the same time as, your helicopter lifted off from the helipad.

counsel might have prepared for trial differently. The purpose of ¶ 6 and the other descriptive paragraphs is to provide notice to respondent of the events the Administrator considers relevant to his charges. Respondent has not shown how this amendment to the factual allegations would affect the nature of the case, respondent's understanding of the charges, or respondent's ability to present his case. See Administrator v. Derrow, NTSB Order EA-3590 (1992) at 5; and Administrator v. Brown, NTSB Order EA-3698 (1992) at 9.

Overall, we cannot find that respondent's assignments of error, considered individually or cumulatively, warrant reversal of the initial decision or dismissal of the Administrator's complaint.

Turning to the Administrator's appeal, we agree that the law judge's analysis of § 91.111(a) is incomplete and inconsistent with precedent. In dismissing that charge based on testimony from the helicopter pilots that they did not see the Pitts, the law judge disregarded precedent holding specifically that the other aircraft need not be seen to find a collision hazard.[16] In light of his factual finding that respondent failed to be vigilant, the law judge's dismissal is inconsistent with, for example, Administrator v. Richey, 2 NTSB 734 (1974) (a violation of § 91.65(a) (now 91.111(a)) does not require an intentional

[16]The rule itself contains no requirement that the aircraft be seen and such an interpretation would illogically limit its coverage to those few pilots that intentionally create a collision hazard.

act). See also Administrator v. Comer, 2 NTSB 2025 (1976), where we noted that, at an uncontrolled airport, pilots have responsibility for separating aircraft and separation should be visually confirmed. In Comer, we affirmed a collision hazard finding where respondent should have been able to see the other aircraft. Accord Administrator v. Knuth, 13 C.A.B. 223 (1951) (issue is whether respondent, with exercise of due vigilance, could have and should have seen converging aircraft).

In light of our affirmance of all the charges brought by the Administrator, as well as respondent's prior violation history (see complaint, ¶ 11) and respondent's failure to contest the length of the proposed certificate suspension, we will reinstate the Administrator's proposed 180-day suspension.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted; and

3. The 180-day suspension of respondent's commercial pilot certificate shall begin 30 days from the date of service of this order.[17]

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HAMMERSCHMIDT, and HALL, Members of the Board, concurred in the above opinion and order.

[17]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).